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WT Docket No. 16-290

WIRELESS TELECOMMUNICATIONS BUREAU SEEKS COMMENT REGARDING TERRESTAR CORPORATION'S REQUEST FOR RELIEF OF CERTAIN 1.4 GHz CONSTRUCTION REQUIREMENTS

DA 16-1029
September 14, 2016

AMENDED OPPOSITION
TO THE PETITION FOR RECONSIDERATION
OF
TERRESTAR CORPORATION (TSC)
TERRESTAR MEDICAL (TM)

BY
JEFFREY M SWARTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

1. On July 22, 2012 I - Jeffrey M. Swarts - filed an objection to the TSC debtors' 3rd Amended Plan of Reorganization in the SDNY bankruptcy court of Judge Sean Lane, Lead Case No. 11 CV 10612 (SHL). In that objection I questioned the debtors' valuation of their estates, including its 1.4 GHz spectrum assets, here at issue before the FCC. I participated vigorously in the TSC

bankruptcy and the associated bankruptcy of Terrestar Networks (TSN) for more than 2-years. Before Confirmation of the 3rd Amended Plan of reorganization the Swarts Claimants held 468,000 of TSTR and had stipulated that a *Manifest Injustice* had been perpetrated against the Swarts Claimants and other minority shareholders of Terrestar similarly situated.

2. The Swarts Claimants were also both Preferred and Common equity shareholders of Loral Space & Communications LTD in its proceeding before Judge Robert Drain in the SDNY, Lead Case No. 03-41710(RDD). In all of these cases, common shareholders received nothing for years of investment in their respective companies. In both cases fiduciaries enticed investors to buy equity in their spectrum, orbital slots, intellectual property and other intangible assets by using upbeat blue sky descriptions of their assets.

INTRODUCTION

3. From the purchase of the 1.4 GHz spectrum by TSC from Port LLC and CCTV, Douglas I. Brandon has been Secretary and General Counsel of Terrestar, except for a brief period post-bankruptcy when he left to work for the Terrestar debtors' counsel – Akin Gump. This Opposition brief is in response to his PETITION FOR RECONSIDERATION filed in the instant proceeding on November 9, 2017 and subsequent *mia culpa explanations*. Nowhere in those voluminous *explanations* does Mr. Brandon take responsibility for the fatuous Jefferies' valuation or the callous and premeditated elimination of the company's equity holders from ownership in New Terrestar, a privately held company that trades infrequently – and last traded at $350 per share. [1] [2]

4. Although the company's prior PETITION filings by Counsel Regina M. Keeney for Terrestar (TSC) and Ari Q. Fitzgerald for GE Healthcare (GEHC) express the technical merits of combining the spectrum with adjacent Wireless Medical Telemetry Service (WMTS) spectrum, they

[1] See: https://www.konitono.com/when-mutual-fund-values-get-muddy/
[2] See: http://socialize.morningstar.com/NewSocialize/forums/3958148/PrintThread.aspx

do not fully appreciate the history of this licensee or its abuse of prior investors through manipulated spectrum and orbital slot valuations in bankruptcy.

5. In the company's latest comment – submitted this time by yet another law firm – Wilkinson Barker Knauer LLC, Terrestar again asserts that its Petition for Reconsideration is "unopposed". [3] Perhaps they are reading a different proceeding docket than I am. Or – more likely – they are using the same tortured logic and legal hair splitting that they used to eliminate common shareholders' interest in TSC in 2012. In fact, the WT Docket shows about a dozen comments opposing the requested relief by the former abused minority shareholders of TSC. In all cases the TSTR shareholders state that they were wronged by the company's management and by extension, its creditors, and its legal and financial representatives in bankruptcy.

6. In fact, John Dooley, who met with representatives of FCC Chairman Ajit Pai on August 6, 2019, along with Douglas Brandon, was first hired by Terrestar less than 6-months after TSC's emergence from bankruptcy on March 7, 2013. Mr. Dooley's initial task was to do a valuation of the 1.4 GHz spectrum here at issue. [4] Instead of the TSC debtors' POR valuation of $0.06 per MHz POP found by Mr. Zelin during Confirmation of the 3rd Plan of Reorganization, Mr. Dooley's report stated values from $0.23 - $0.80 per MHz POP for partial aggregation and as high as $0.69 - >$1.00 per MHz POP if the spectrum were "refarmed" into a more robust 5 X 5 MHz FD-LTE configuration. All of these valuation issues were described in detail in my prior comment in the 16-290 Proceeding, filed on May 14, 2018. [5]

[3] Notice of *Ex Parte* Presentation, *Terrestar Corporation Request for Temporary Waiver of Substantial Service Requirements for 1.4 GHz Licenses, WT Docket No. 16. 1 6-290*

[4] See pg. 16 here: https://ecfsapi.fcc.gov/file/10514686924369/EXHIBIT%20D%20-%20Jarvinian%20Valuation%20-%20TerreStar%201400%20MHz%20Spectrum.pdf

[5] See pg. 4-5 here: https://ecfsapi.fcc.gov/file/10514686924369/Jeffrey%20M%20Swarts%20-%20Opposition%20to%20Terrestar%20License%20Extensions%20-%201.pdf

THE JARVINIAN VALUATION

7. The Jarvinian valuation report dated September 13, 2013 was issued just a few months *before* Terrestar claims it found that its high power smart grid devices interfered with low power WMTS devices in the adjacent spectrum. In their August 8, 2019 presentation TSC states the following:

> "TerreStar first learned in early 2014 that its RF compliant smart grid operations could cause significant harmful interference to new adjacent-band medical telemetry systems (first certified in 2011). Extensive laboratory and field tests confirmed that compliant smart grid operations would have a deleterious impact on these WMTS devices and systems at health care facilities…"

So, within 6-months of hiring John Dooley – a recognized RF expert – Terrestar management realized that they had not only grossly undervalued the 1.4 GHz spectrum in bankruptcy, but that their long-concealed high power smart grid business plan was just another in a long line of commercial boondoggles. They also learned that Airspan, which designed and built the smart grid technology ecosystem, had not bothered to enquire whether their high power ecosystem would cause interference to low power WMTS devices in adjacent spectrum. They neglected to ask these key technical questions despite the widely known fact that similar desensitization of GPS receivers by the high power Lightsquared 1.6 GHz ATC ecosystem was responsible for its bankruptcy on May 14, 2012 – 2-years earlier. In their presentation, they claim that WMTS devices were first licensed by the FCC in 2011. So, it took them 3-years through the pendency of the Terrestar bankruptcies to evaluate interference issues with WMTS devices. How convenient for them.

8. Terrestar's current re-characterization of events in their latest presentation strains even the most generous interpretation during this formative period. In July of 2009 TSC entered into a self-dealing lease of the 1.4 GHz spectrum with LightSquared, despite the fact that Phil Falcone and his Harbinger funds were the largest shareholders of both Terrestar and LightSquared. Then, in July of

2012, 1.4 Holdings sought and received FCC consent to replace the 1.4 GHz spectrum manager lease agreement with a long-term *de facto* lease agreement to LightSquared. This lease encumbered the 1.4 GHz spectrum to an entity that had no stated plans to use it for just *di minimus* revenues to the TSC enterprise to cover managerial and legal expenses.

9. On October 13, 2010 – just 3-months later – TSC amended the lease with Lightsquared with FCC approval. On October 19, 2010 – just 6-days later – Terrestar Networks filed for Chapter 11 bankruptcy in a phased pre-packaged bankruptcy designed to separate the 2.0 GHz spectrum, TS-1 and TS-2 satellites, an orbital slot over Europe and the 2 GHz ecosystem technology from the TSC estate. Akin Gump was officially hired as its legal advisors even though they had actively prepared for the Chapter 11 filing – unbeknownst to the minority shareholders of the company.

10. Just one month later on November 14, 2010 LightSquared successfully launched SkyTerra-1 employing the prior 1.6 GHz spectrum licenses of Terrestar. So, the bankruptcy of Terrestar Networks, which would have competed directly with LightSquared, assured the GEO ATC market in North America would be dominated by LightSquared. This bad faith sweetheart lease to Harbinger was designed to impair the value of the sole remaining significant asset of TSC – the 1.4 GHz spectrum – here at issue and as acknowledged by Sarah Schultz for the debtors in the bankruptcy court proceedings. On November 19, 2010 – just 5-days later Elektrobit – the maker of the award winning Genus phone – sued TSC in the New York Supreme Court for $25.6 million as the guarantor of the TSN contract. In February of 2011, as the corporate parent of TSN, TSC filed a follow-on bankruptcy – again with Akin Gump as its legal advisors.

11. Previously, in 2008, Terrestar hired Jefferies to do a "fairness opinion" of the TSC 1.4 GHz spectrum. It was filed with the SEC in February of 2008 as a Schedule 14C-PRE. On pg. 20 it stated:

> "Jefferies calculated the projected low, median and high value of the 1.4 GHz Band Spectrum to the Company under each business plan. Jefferies then summed the low, median and high projected values of each business plan to calculate aggregate low, median and high projected values of the 1.4 GHz Band Spectrum to the Company, assuming successful implementation of the proposed business plans. The resulting low, median and high projected values of the 1.4 GHz Band Spectrum to the Company were $533.4 million, $670.3 million and $856.2 million, or $0.23, $0.29 and $0.37 per MHz POP acquired in the Transactions, calculated using a discount rate of 20.0% and a terminal growth rate of 6.0%. Jefferies compared these values to the amount paid by the Company per MHz POP in the Transactions."

This valuation permitted TSC to issue an additional 30-million shares of common and two tranches of Preferred Equity, which were later used as the fulcrum securities to take the company private in a phased pre-packaged bankruptcy.

12. During the Confirmation of the TSC 3rd Amended Plan of Reorganization I objected to the debtors' $175 million valuation of the spectrum assets here at issue. I took part in Confirmation hearing and cross-examined Blackstone "expert" Steve Zelin under oath. I questioned him for over an hour about his background in terrestrial spectrum valuation (he had none) and the debtors' POR valuation of $0.06 - $0.09 per MHz POP of the 1.4 GHz spectrum at issue in this proceeding. He also defended the RKF valuation even though that testimony violated the Daubert Standard that does not allow one expert to testify for another. Nevertheless, Judge Lane agreed with his testimony and the debtors' valuation. His subsequent order eliminated the common shareholders of the company from receiving any distribution, including warrants which would have protected the "prepackaged" creditors and assured a fair distribution to equity holders if the spectrum was found to be more valuable than anticipated.

13. Post-Confirmation, the newly reorganized TSC hired John A. Dooley and Jarvinian to do the study and valuation of the 1.4 GHz spectrum. In his report, dated September 13, 2013, Mr. Dooley suggested that aggregating it into a more robust 5 X 5 MHz FD-LTE configuration, would

boost its value up to $0.69 - >$1.00 per MHz POP. Even partial aggregation within the existing spectrum implied values from $0.23 - $0.80 per MHz POP. Yes, these values by far outstrip the Confirmation value of $0.06 - $0.09 per MHz POP presented by Mr. Zelin and accepted by the Court. There is no doubt that the debtors understood exactly what they were doing when they valued the spectrum pre-petition using the 2008 Jefferies' "fairness opinion", during the pendency of the bankruptcy, using Mr. Zelin and Blackstone, as well as the RKF study, and post-petition when they hired John Dooley to do find the once again buoyant values of the Jefferies Fairness Opinion offered in 2008. All of these vastly differing valuations were presented for differing motives depending upon which outcome Terrestar's creditors and management were seeking at the time.

14. The Dooley valuation is consistent with the low-end values from the 2008 Jefferies' opinion. So, less than a year after confirmation, TSC had in hand a highly credible valuation that confirmed every valuation argument that I had made to the Court over 2-years of litigation. Further, had the Court approved the Examiner motions that I and others repeatedly made, these values would have been confirmed and shareholders would have received a distribution from the estate.

15. Is it a coincidence that during the examiner motion hearings there were insufficient funds or time to conduct a credible valuation by an acknowledged industry expert, but that post-confirmation there was plenty of time and money? No. This behavior is consistent with the debtors' management's drive to eliminate its common equity owners at every possible opportunity, callously and without fiduciary regard for the Character and Candor requirements of FCC's licensees.

16. TSC emerged from bankruptcy on March 7, 2013, more than 6-years ago. It is unconscionable that these financial predators now complain that they have been victimized by the Commission for failing to make reasonable progress to build their network under Part 27. They have had more than 10-years since the licenses were authorized by the FCC to understand the sensitivity

of adjacent WMTS devices. Their plans to deploy a full power WiMAX terrestrial network should have been informed by the LightSquared fiasco in which GPS receivers were also found to be desensitized in a similar scenario by high power ATC spectrum. Clearly, they knew better. As the former licensees of the LightSquared's 1.6 GHz spectrum, they were obviously cognizant of this sort of interference. In fact, the LightSquared fiasco dominated the popular communications media for years. Is it credible that they didn't "get it" when even a minority shareholder in rural Ohio did? In a word, "No" it is not.

17. Similarly, the TSN spectrum in the 2.0 GHz band – as well as similar and adjacent ICO/DBSD spectrum – was purchased by Echostar and Charles Ergen in court-sponsored auctions for $2.78 billion combined, despite prior valuations by Jefferies at 7-times that amount. It currently lies fallow as Mr. Egren has been unable or unwilling to build out this Part 27 spectrum thus far. TSN and ICO/DBSD sought and were granted authorization under the ATC rules to use their spectrum for Part 27 high power terrestrial service – the same as TSC's 1.4 GHz spectrum. Dish recently agreed to buy spectrum and the prepaid Boost brands from T-Mobile and Sprint as part of their previously-approved FCC merger. So perhaps Charles Ergen will finally build the wireless network as it reaches the end of its Part 27 build out deadline.

TERRESTAR'S PART 27 BUILD-OUT REQUIREMENTS

18. The FCC awards spectrum licenses on the basis of the public interest. It is in the public's interest to have spectrum readily available to use for needed wireless communications. During TSC's bankruptcy the company's fiduciaries concealed a FirstEnergy smart metering pilot program in New Jersey, Pennsylvania and Ohio from shareholders and the investing public. This was a highly credible and promising pilot program that proved the propagation efficiency of the 1.4

GHz spectrum using Airspan WiMAX base stations. Because the First Energy meters were outdoors, harmful interference to WMTS devices, most of which were used indoors in hospitals and doctors' offices, was largely mitigated. In fact, it was not until April 2016 – 9-years into the Part 27 license term that Terrestar chose to officially abandon its WiMAX smart grid business plan in favor of what it perceived as a more profitable WMTS business. We now know that they knew less than 6-months after emergence from bankruptcy, and contemporaneously with the Dooley valuation, that their smart grid business plan was a bust.

19. Not surprisingly, when Sarah Schultz – for the TSC debtors – was objecting to calls for an examiner, she repeatedly made reference to the lack of an "ecosystem" for the "narrowband" 1.4 GHz band. This was despite the *fact* that a substantial 802.16 WiMAX ecosystem and FirstEnergy pilot program was already in existence by 2011. She made these statements in a hearing further to my motion for an examiner under 1104(c) of the Chapter 11 bankruptcy code. The Court denied the Motion and a subsequent similar Motion by Aldo Perez. The debtors repeatedly referenced the expense and time that an examiner would require as primary reasons to deny shareholder requests.

20. Furthermore, Ms. Schultz was simply wrong that the 1.4 GHz band could not support broadband services. LTE often employs channels of 1.5 MHz, 3 MHz and 5 MHz, all of which would fit within the existing band parameters of the 1.4 GHz spectrum. Perhaps she was misinformed, but if she was, it was as a member one of the most connected and technically adept law firms in the country. Furthermore, the debtors' arguments about the extensive radar exclusion zones in the band do not hold water either. It is a fact that the radar exclusion zones existed when Auction 69 occurred. They were in effect when Jeffries did its "fairness opinion" in 2008 and they

existed when John Dooley did his valuation post-emergence. So, the argument that the exclusion zones made the spectrum less valuable is false. They were a constant in all of the various valuations.

21. On January 30, 2018 Ivan Arteaga – an acknowledged industry expert -- published an analysis of the 1.4 GHz spectrum. [6] In his conclusions Mr. Arteaga stated that the 1.4 GHz spectrum "…is mobile broadband spectrum. Accordingly, any valuation of the 1.4 Spectrum that relies on an examination of relative comparable precedent transactions, should be primarily in this universe." He also stated, "Mobile broadband spectrum values in the U.S. were rising and were likely to continue to rise, if not accelerate, during the analysis period." He wrote that "The value of the 1.4 Spectrum falls in a range between $690-$936 million or $0.28 per MHz-POP to $0.38 per MHz-POP" with an "implied residual equity value to TSC equity shareholders, accordingly, … in a range of $175 to $420 million or $1.25 to $3.05 per share", including payment in full of the "$515.5 million in claims accruing through the effective date of the bankruptcy." Based upon his analysis, there is *no doubt* that TSTR shareholders should have received a distribution from the TSC estate. This represents a *manifest injustice*, facilitated by the FCC's transfer of the licenses to New Terrestar upon emergence. So, it is with some irony, that the TSTR shareholders now observe TSC's current ownership complaining bitterly about how unfairly they have been treated by the FCC.

ARGUMENT

22. There is no doubt that the preferred shareholders and other creditors received more than the face value of their claims – obscenely so. The fact that they and Terrestar management chose to mismanage and warehouse the spectrum rather than develop it expeditiously is further evidence that they were playing a disingenuous game with regulators – and that they continue to do so. On the one hand, they produce buoyant valuations to attract new investors, but somehow can't

ever seem to create a viable enterprise that serves the public interest. That they have now morphed perpetual mismanagement into "Terrestar Medical" is not persuasive. They could have pursued this course in 2012-13 without purposefully and callously dispensing with their common equity ownership in bankruptcy.

23. Had the TSC debtors embraced the company's shareholders and issued warrants or otherwise found a way to remain a public corporation and include shareholders in the reorganization, the company would have found its raison d'etre sooner and with greater available financial resources. Instead, the company and its fiduciaries dumped their common shareholders to focus on their hedge fund senior preferred equity owners. And now, they blame the FCC for their self-created dilemma. They want more time than other Part 27 licensees – well – because they want it. The fact is that the 1.4 GHz spectrum will be used to enhance WMTS data communications, because it is technically logical to do so, just as it was logical in 2013 when TSTR ownership disappeared upon emergence from bankruptcy. The only question is who will control the spectrum and who will profit from this *obvious* use of the 1.4 GHz spectrum to enhance medical applications.

24. The Terrestar debtors' professionals repeatedly made reference during the bankruptcy proceedings to the naiveté of shareholders. So, it is with some irony that former shareholders now observe TSC feigning ignorance about the harmful interference their smart grid business plan caused to WTMS incumbents. By their own admission, WMTS devices were first certified in 2011, nearly 2-years before the emergence of TSC from bankruptcy. It is telling indeed that Terrestar Medical – in its latest FCC comment – does not include any detail on the timing of when and with whom they were "actively pursuing alternative plans for use of its spectrum…"

[6] See pg. 4-5 of https://ecfsapi.fcc.gov/file/10322243083431/Valuation%20Study%20Report%20of%20the%201.4%20GHz%20Spectrum%20done%20by%20Ivan%20Arteaga.pdf

Clearly, their first priority was eliminating the common shareholders ownership in bankruptcy – and then and only then – providing additional spectrum for medical device communications.

25. It has been the company's flawed and self-dealing management that has led again and again to corporate failure, ensnaring its investors in ever-widening financial disaster. There is no guarantee, even if the FCC were to permit an extension waiver that the company would succeed this time. They have lurched from one erstwhile business to the next. First there was the Motient beeper business, then the Terrestar FCC First Responder network, to Lightsquared's ATC system utilizing the Skyterra 1.6 GHz spectrum, to Terrestar's FirstEnergy pilot program, and now Terrestar Medical's current plan to be a WMTS provider.

26. Yes, Terrestar's business plans collided with those who were more committed to the development of alternative plans for adjoining spectrum. However, Terrestar was hardly a novice in the competitive landscape of spectrum utilization. In fact, they have always chosen the path of greatest *private equity* enhancement to the path of the public interest. At the end of the day, the public interest and their public corporation shareholders were simply a vehicle to greater wealth for the few controlling the company's public spectrum assets through artificially created fulcrum securities.

27. Terrestar's current argument before the Commission is that the FCC failed to consider the record. They argue that had the FCC done so, the extension waiver would have been granted. Has there ever been a corporation that has garnered more of the Commission's and public's attention than Terrestar and its associated corporations, while delivering so little in actual benefits to the American public? We have heard and invested in one boondoggle after another authored by these people. Time after time they have entered Chapter 11 bankruptcy protection after their promises to shareholders and the public have been exposed as nothing more than artful rhetoric.

28. In the past 15-years TSC has never provided substantial services. Could this finally be the time that they do so? Perhaps. Apparently, they have been very busy behind the scenes while the statute of limitations for possible common shareholder class actions has been ticking away. Only the FCC stands between a fair outcome for common minority shareholders of TSTR and controlling hedge funds of Terrestar Medical. Only the FCC can extract Terrestar compensation at this juncture for the wrongfully eliminated minority common shareholders of TSC.

29. Our public spectrum assets were wrongly taken from us using manipulated valuations that drew us into the stock. Those valuations suddenly disappeared when later subjected to DCF calculations based upon a hollow sweetheart lease to an insider of the company, Philip Falcone and Harbinger – the original controlling shareholders of both the Terrestar and LightSquared enterprises. Of course anyone with an understanding of how development stage companies are valued knows that DCFs are inappropriate to value them. Only comparable companies and spectrum transactions can be used to generate accurate valuations for such companies. That is what Mr. Arteaga did in his valuation analysis submitted on March 22, 2019 by Mr. Aldo I. Perez.

30. There is no doubt that TSTR shareholders were incorrectly eliminated in the Terrestar bankruptcy. Any submission of comparable transactions from WMTS incumbents and other comparable transactions analyzed by Mr. Arteaga would have upended the 3rd Plan of Reorganization. Furthermore, the debtors, their attorneys and Mr. Zelin knew better at the time and concealed vital valuation information in a successful, but corrupt effort to convert the ownership of Terrestar.

31. Mr. Dooley's valuation just a few months after emergence confirms this fact. It is curious that his 2013 valuation did not consider aggregation with the WMTS incumbents, and that he subsequently became the controlling partner of 2014 AWS Spectrum Bidco and an insider of

Terrestar Medical. The entire corporate history of TSC is riven with self-dealing and this recent episode follows a similar pattern. Mr. Brandon now claims Terrestar's petition is "unopposed" despite the existence of a dozen comments informing the FCC of its duty. They are now lobbying FCC commissioner staff to permit the build-out waiver, reinstating the 1.4 GHz licenses and adding 3-years to the term. If granted, without compensating the abused former minority shareholders of TSTR, it would be a travesty of justice – a *manifest injustice* – once again.

32. The only remaining question – now that these facts are widely known – is whether the FCC will abridge its own Character and Candor rules for spectrum licensees and approve the Terrestar Medical waiver, or whether they will demand that the wrongly eliminated minority shareholders be fully compensated before any waiver is approved. Conversely, the waiver petition could be denied, with the spectrum auctioned again to benefit the federal treasury or simply granted to the TSTR minority shareholders, who had their interest in the company's spectrum assets wrongly eliminated.

THE PUBLIC INTEREST IS SERVED BY WMTS

33. The most compelling element of this request for additional time to build a WTMS business is that it would serve people who are ill and dying. There is no doubt that it is a noble cause and that GE and Phillips, among others, are fully capable of building this service and integrating Terrestar's spectrum with current WTMS incumbent licensees in adjacent bands. Yes, this spectrum should be repurposed for this reason – to provide additional capacity to save and enhance the health of American lives.

TERRESTAR MANAGEMENT SERVES ITSELF

34. However, again and again Terrestar has used the rhetoric of the public interest to pad private hedge fund pockets – using every legal and stonewall tactic they could imagine to do so. Ask

Elektrobit about the way they were stiffed by the company's fiduciaries, when they returned pallets of the award-winning Genus phone. Ask them about the TSC Chapter 11 filing, following their New York Supreme Court lawsuit when they demanded payment through the courts. Ask them about how they were stonewalled for over year until finally being paid in full. There is no reason to believe that management will change their tactics or serve the public interest once their public interest rhetoric to regulators is no longer useful.

35. For nearly 3-years shareholders implored Terrestar management to treat them fairly in bankruptcy. For nearly 3-years the 2 GHz and 1.4 GHz spectrum were known to be a set of very valuable intangible assets. Terrestar management could have chosen to act differently. One director immediately resigned when the company filed for bankruptcy protection. The CEO Jeffrey Epstein also resigned rather than face shareholders in court. Perhaps now that the spectrum has been recaptured by the FCC, the company's fiduciaries and attorneys now regret their deplorable predatory behavior in court. Perhaps now they regret their intransigence toward shareholders and minority claimants who only wanted to be justly and fairly treated. Instead, we were manipulated with intransigence, spurious arguments, corrupt valuations and settlement offers that turned out to be bait and switch tactics designed to run out the clock before Judge Lane.

36. Management chose to callously pursue the private accumulation of wealth using the hollow rhetoric of the public interest, although their actual behavior *never* embraced their rhetorical ideals. The FCC should deny the company's rhetoric and look at the *facts* of what they actually did *and* what they did *not* do – which is a lot.

37. Of course developing a new spectrum band takes time. Of course a new ecosystem must be created for a new spectrum band and application. Of course base stations and devices must be designed, tested, manufactured and distributed *before* the spectrum can be put to *intensive use.*

Terrestar's management knew this intimately by the time they had launched TS-1 and designed and manufactured the Genus phone. They knew how long it took for their technical experts – like RKF Engineering to configure the satellites spot beams – a process that went on for months and months. These conditions are not factors that they didn't understand.

38. They already had a working ecosystem in a pilot program with FirstEnergy and others in 2012, even though they argued otherwise in court. They were well aware of what it took to build a new business and they waited until the last possible moment to enquire of the WMTS incumbents in adjacent spectrum whether their WiMAX ecosystem would cause harmful interference. It was gross negligence not to have coordinated these technical issues earlier in the development of the smart grid business.

39. The Part 27 license term is set at 10-years for a reason. It is a long period, but it requires due diligence, resilience, creativity and sufficient financing to be successful. The statutory risks of failure are borne by the licensee not the Commission. This is spelled out in every license grant. There are many licensees who have failed to meet build-out deadlines, like Straight Path and Fibertower. Both companies were forced by the Commission to sell or relinquish their licenses because of their inability to meet Part 27 deadlines. There is nothing unique or inequitable about the FCC's decision to cancel the Terrestar 1.4 GHz licenses. In fact, it would be unique and inequitable to licensees who have been forced to relinquish their spectrum licenses if the FCC did not do so in this case – where management has been given every possible opportunity to succeed and has repeatedly squandered those opportunities.

THE FCC's ORDER IS NOT CAPRICIOUS OR CONTRARY TO LAW

40. Terrestar Medical uses AT&T Mobility as an example of a situation where a similar situation was afforded a waiver extension due to unforeseen technical complexities. The difference? There was no doubt that AT&T would eventually manage to properly coordinate the technical issues at issue. There was no long prior history of empty rhetoric or investors being jammed by their fiduciaries. To extrapolate from AT&T to the instant Terrestar proceeding is the height of absurdity.

41. Terrestar had a business plan that it was executing regarding the use of their spectrum for smart grid applications. They had first tested it in 2012 for FirstEnergy and had they deployed the system nationwide expeditiously, they would have been the 1st mover and WTMS ultra-low power devices would have forced the redesign of WMTS devices with more robust RF filters. Instead, they chose to focus on eliminating their equity ownership in bankruptcy.

42. Terrestar management freely chose to delay the smart grid build-out until they were no longer in control of the future of their business plan to concentrate their efforts on converting ownership of the enterprise. They committed gross negligence by *not* engaging the adjacent band incumbents in a NPRM or otherwise expeditiously coordinating the issues at hand. And now they claim it is the FCC that is at fault and capricious? It is not the FCC's duty to husband deficient licensees to success any more than it is their job to pick winners and losers. However, it is within the Commission's charter to correct licensees who have failed to live up to their Public Interest and Character and Candor obligations – as Terrestar clearly has over the past dozen years. It is within the Commission's charter to enforce its orders, the Part 27 obligations of licensees and correct the wrongs suffered by prior investors due to mismanagement, corruption and self-dealing.

CONCLUSION

43. The 1.4 GHz spectrum here at issue was a very valuable intangible asset that was squandered by Terrestar's management as part of a complex spectrum warehousing strategy. In February of 2008 Jefferies found values of "…$533.4 million, $670.3 million and $856.2 million, or $0.23, $0.29 and $0.37 per MHz POP." At the time, the "radar exclusion zones" were in place and have been since the original FCC Auction 69 in February of 2007. [7] Two bidders, including Port LLC and CCTV, won all 64 licenses at a cost of $123,599,000. That was the value later used in bankruptcy to eliminate the minority common shareholder claims during the TSC bankruptcy.

44. Significantly, Sarah Schultz for the debtors stated that there was no ecosystem for the band, despite a now admitted full WiMAX smart metering ecosystem which had been developed by Airspan by 2012. They also claimed that it was not broadband spectrum, even though today 1.5, 3.0 and 5.0 MHz channels are commonly in use for broadband, consistent with the architecture of the 1.4 GHz FTD bands. Significantly, WMTS incumbents have had few difficulties developing their devices in adjacent bands. This should have been the comparable used to value the spectrum in bankruptcy, not a self-dealing lease to the largest shareholder of TSC that encumbered the spectrum and provided a pretext to use *di minimus* DCFs to falsely undervalue it. The FCC should not reward fiduciaries and beneficial owners who contrived these false valuations.

45. Clearly, Terrestar Medical has reinvented itself in an effort to restore its sullied image, but it offers no remedy for those who they wrongly eliminated in bankruptcy. The beneficial ownership and its fiduciaries remain in place. They have failed to meet their Part 27 obligations and the FCC has rightfully and lawfully recaptured the spectrum. Repeated attempts to fashion a remedy over almost a decade by the eliminated minority shareholders of TSTR have been ignored. Recent efforts to find a solution to the Terrestar Waiver Petition have also been ignored.

46. Mr. Arteaga in his Valuation Study found a residual value of $1.26 - $3.03 per share of TSTR, consistent with the Jefferies Valuation of 2008. [8] Should Terrestar Medical provide such a valuation as senior securities and/or warrants, the minority shareholders would likely support the Waiver Request. However, in the absence of such a remedy, the FCC should auction the 1.4 GHz, reserving a just percentage of the proceeds and/or a stake in the new business as compensation for the eliminated minority shareholders of TSTR – including sufficient funds for professional representation that was repeatedly opposed by the Terrestar debtors in bankruptcy and repeatedly denied by the Court.

47. There are several paths that the FCC could devise that would provide just remedies to all parties and yet still serve the Public Interest by increasing the amount of spectrum available for WMTS applications. Other interested parties could provide the corporate partner(s) necessary to ensure that the spectrum reach its full potential use *and* protect prior, present and future investors in the 1.4 GHz Band. The eliminated prior minority shareholders of TSTR, who remain opposed to an unrestricted waiver of the Part 27 rules in the WB Docket No. 16-290 Proceeding, stand ready and willing to work with the Commission to fashion a just and practical remedy that serves the medical community and its patients.

Respectfully,

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/Jeffrey M. Swarts
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[7] See: https://www.fcc.gov/auction/69/factsheet
[8] See pg. 59: "AN ECONOMIC AND INDUSTRY ASSESSMENT OF THE VALUE OF THE TERRESTA CORPORATION COMMON EQUITY INTEREST AND THE UNDERLYING VALUE OF ITS 1.4 GHZ SPECTRUM AT BANKRUPTCY", by Ivan Arteaga MBA, CFA, LLC